Lim Swee Choo & Anor v Ong Koh Hou @ Won Kok Fong and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCvC)(W)-439–03 OF 2022 AND W-02(NCvC)(W)-449–03 OF 2022
RAVINTHRAN, WONG KIAN KHEONG AND AZHAHARI RAMLI JJCA
19 APRIL 2024

Contract — Consideration — Total failure of — Plaintiffs undertook to assign absolutely to defendant all their rights, title and interest in four pieces of land in return for payment of RM23m — Plaintiffs were legally incapable of making the assignment — Whether consideration paid by defendant for the assignment should be wholly returned by plaintiffs on ground of total failure of consideration

In Appeal No 439 ('the first appeal'), the appellants ('plaintiffs') appealed against the High Court's dismissal of their suit ('original action') against the respondent ('defendant'). In Appeal No 449 ('the second appeal'), the defendant appealed against the High Court's dismissal of his counterclaim against the plaintiffs. Since 2013, the first plaintiff had owed RM20m to the defendant ('P1's debt'). In June 2015, the plaintiffs entered into a sale and purchase agreement ('the plaintiffs-DAL SPA') to buy four pieces of land ('the lands') from a company ('DAL') for RM23m. The plaintiffs then signed an assignment/supplemental agreement with the defendant under which they assigned absolutely to the defendant all their rights and interests in the lands for a price of RM25.5m ('the assignment price'). P1's debt was set off against the assignment price and the defendant paid the plaintiffs a further RM3m leaving an unpaid balance of RM2.5m which, the parties agreed, would be the plaintiffs' 'investment' in the lands (amounting to 4.5% of the value of the lands). Meanwhile, DAL had sued the plaintiffs (in Suit 688) to declare the plaintiffs-DAL SPA void on the ground that it was an unlicensed moneylending transaction. Suit 688 ended in a consent judgment/settlement agreement between the parties under which the plaintiffs declared that they had no right, claim or caveatable interest in the lands. In the original action, the plaintiffs sued the defendant for recovery of RM2.5m contending that this was the sum they incurred as special damages for the defendant's alleged breach of the assignment/supplemental agreement. The defendant denied the claim and raised a counterclaim stating that the plaintiffs had deceived him into entering into the assignment/supplemental agreement, that the plaintiffs had knowingly concealed from him the fact that before the assignment /supplemental agreement was concluded, DAL had actually sold one of the lands to a person named Ho ('the DAL-Ho sale'). By reason of the DAL-Ho

sale and the plaintiffs' declaration under the Suit 688 consent judgment that they had no rights, claim and interest in the lands, the defendant contended that the plaintiffs were legally unable to assign the lands to him; hence, the assignment/supplemental agreement was void for total failure of consideration and the plaintiffs be held jointly and severally liable to return the RM23m he had paid towards the assignment price. The High Court dismissed both the original action and the defendant's counterclaim holding that: (a) there was no evidence to prove that the assignment/supplemental agreement was tainted by any illegality in the plaintiffs-DAL SPA; (b) since the plaintiffs knew of the DAL-Ho sale at all material times, the assignment/supplemental agreement could not be completed without variation; and (c) the plaintiffs were not entitled to claim for RM2.5m from the defendant as he had not breached the assignment/supplemental agreement.

Held, dismissing the first appeal (and affirming the High Court's decision to dismiss the original action), allowing the second appeal (and setting aside the High Court's dismissal of the counterclaim), ordering the plaintiffs, jointly and severally, to return the sum of RM23m to the defendant together with interest and costs:

(1) The assignment/supplemental agreement was not tainted by any illegality in the plaintiffs-DAL SPA because no evidence was adduced by the defendant at the trial to prove that the said SPA had contravened the Moneylenders Act 1951 and was thus void (see para 24).

(2) Section 66 of the Contracts Act 1950 ('the CA') had no application in this case as the assignment/supplemental agreement was neither 'discovered to be void' nor 'had become void' as understood in s 66 of the CA (see paras 27–28).

(3) There was total failure of consideration in the instant case. It was not disputed that the defendant had paid the plaintiffs RM23m towards the assignment price. However, the plaintiffs were not in a position to assign absolutely to the defendant any right or interest in the lands by reason of the DAL-Ho sale and the plaintiffs' declaration under the Suit 688 consent judgment that they had no right, claim or caveatable interest in the lands. The High Court judge erred in failing to find that there was a total failure of consideration in this case and in not ordering the plaintiffs to return the RM23m to the defendant (see paras 35–36, 38 & 44).

(4) In view of the total failure of consideration, it was unconscionable for the plaintiffs to rely upon the assignment/supplemental agreement to claim the sum of RM2.5m from the defendant. If the original action was allowed, the plaintiffs would be unjustly enriched by that sum because they could not assign absolutely any right or interest in the lands to the defendant. For that reason, the original action should be dismissed and not for the reason given by the High Court, namely, that the defendant

had not breached the assignment/supplemental agreement. In other words, even if it was assumed that the defendant had breached the assignment/supplemental agreement, the original action should still be dismissed because it was unconscionable for the plaintiffs to claim the RM2.5m from the defendant (see paras 40–41).

(5) The High Court erred in finding that the plaintiffs had suffered loss. They could not have suffered any loss as they were never in a position to assign absolutely any right or interest in the lands to the defendant under the assignment/supplemental agreement (see para 42).

(6) The defendant could not rely on s 71 of the CA as that section only applied where there was no contract between the parties, unlike in the instant case (see para 51).

[Bahasa Malaysia summary

Dalam Rayuan No 439 ('rayuan pertama'), perayu ('plaintif') merayu terhadap penolakan Mahkamah Tinggi terhadap saman mereka ('tindakan asal') terhadap responden ('defendan'). Dalam Rayuan No 449 ('rayuan kedua'), defendan merayu terhadap penolakan Mahkamah Tinggi terhadap tuntutan balasnya terhadap plaintif. Sejak 2013, plaintif pertama telah berhutang RM20 juta kepada defendan ('hutang P1'). Pada Jun 2015, plaintif memasuki perjanjian jual beli ('the plaintiffs-DAL SPA') untuk membeli empat keping tanah ('tanah tersebut') daripada sebuah syarikat ('DAL') dengan harga RM23 juta. Plaintif kemudiannya menandatangani perjanjian penyerahkan hak/tambahan dengan defendan di mana mereka menyerahkan sepenuhnya kepada defendan semua hak dan kepentingan mereka terhadap tanah tersebut dengan harga RM25.5 juta ('harga penyerahkan hak'). Hutang P1 telah ditolak dengan harga penyerahan hak dan defendan membayar plaintif sebanyak RM3 juta lagi meninggalkan baki RM2.5 juta yang belum dibayar yang mana, pihak-pihak bersetuju, akan menjadi 'pelaburan' plaintif dalam tanah (berjumlah 4.5% daripada nilai tanah). Sementara itu, DAL telah menyaman plaintif (dalam Saman 688) untuk mengisytiharkan SPA plaintif-DAL terbatal atas alasan bahawa ia adalah transaksi pinjaman wang tidak berlesen. Saman 688 berakhir dengan penghakiman persetujuan/perjanjian penyelesaian antara pihak-pihak di mana plaintif mengisytiharkan bahawa mereka tidak mempunyai hak, tuntutan atau kepentingan boleh kaveat terhadap tanah tersebut. Dalam tindakan asal, plaintif menyaman defendan untuk mendapatkan semula RM2.5 juta dengan alasan bahawa ini adalah jumlah yang mereka tanggung sebagai ganti rugi khas untuk dakwaan defendan melanggar perjanjian penyerahan hak/tambahan. Defendan menafikan tuntutan itu dan membangkitkan tuntutan balas yang menyatakan bahawa plaintif telah memperdayanya untuk memasuki penyerahan hak/perjanjian tambahan, bahawa plaintif telah dengan sengaja menyembunyikan daripadanya fakta bahawa sebelum penyerahan hak/perjanjian tambahan itu dibuat, DAL sebenarnya telah menjual satu tanah kepada seseorang bernama

Ho ('jualan DAL-Ho'). Atas sebab jualan DAL-Ho dan pengisytiharan plaintif di bawah penghakiman persetujuan Saman 688 bahawa mereka tidak mempunyai hak, tuntutan dan kepentingan ke atas tanah-tanah tersebut, defendan berpendapat bahawa plaintif secara sah tidak dapat menyerahkan tanah-tanah itu kepadanya; oleh itu, penyerahkan hak/perjanjian tambahan adalah terbatal atas kegagalan balasan sepenuhnya dan plaintif dipertanggungjawab secara bersama dan berasingan untuk memulangkan RM23 juta yang telah dibayarnya terhadap harga penyerahan hak. Mahkamah Tinggi menolak kedua-dua tindakan asal dan tuntutan balas defendan dengan memutuskan bahawa: (a) tiada keterangan untuk membuktikan bahawa penyerahan hak/perjanjian tambahan telah dicemari oleh mana-mana penyalahan undang-undang dalam SPA plaintif-DAL; (b) memandangkan plaintif mengetahui jualan DAL-Ho pada setiap masa material, penyerahan hak/perjanjian tambahan tidak dapat disempurnakan tanpa variasi; dan (c) plaintif tidak berhak menuntut RM2.5m daripada defendan kerana dia tidak melanggar perjanjian penyerahan hak/tambahan.

Diputuskan, menolak rayuan pertama (dan mengesahkan keputusan Mahkamah Tinggi untuk menolak tindakan asal), membenarkan rayuan kedua (dan mengenepikan penolakan Mahkamah Tinggi terhadap tuntutan balas), memerintahkan plaintif, secara bersama dan berasingan, memulangkan jumlah RM23 juta kepada defendan berserta faedah dan kos:

(1) Penyerahan hak/perjanjian tambahan tidak dicemari oleh mana-mana penyalahan undang-undang dalam SPA Plaintif-DAL kerana tiada keterangan dikemukakan oleh defendan semasa perbicaraan untuk membuktikan bahawa SPA tersebut telah melanggar Akta Pemberi Pinjam Wang 1951 dan dengan itu tidak sah (lihat perenggan 24).

(2) Seksyen 66 Akta Kontrak 1950 ('AK') tidak terpakai dalam kes ini kerana penyerahan hak/perjanjian tambahan tidak 'didapati terbatal' mahupun 'telah menjadi terbatal' seperti yang difahami dalam s 66 AK (lihat perenggan 27–28).

(3) Terdapat kegagalan balasan sepenuhnya dalam kes semasa. Tidak dipertikaikan bahawa defendan telah membayar plaintif RM23 juta terhadap harga penyerahan hak. Walau bagaimanapun, plaintif tidak berada dalam kedudukan untuk menyerahkan secara mutlak kepada defendan apa-apa hak atau kepentingan ke atas tanah-tanah tersebut atas sebab jualan DAL-Ho dan pengisytiharan plaintif di bawah penghakiman persetujuan Saman 688 bahawa mereka tidak mempunyai hak, tuntutan atau kepenting kaveat terhadap tanah tersebut. Hakim Mahkamah Tinggi terkhilaf kerana gagal mendapati terdapat kegagalan balasan dalam kes ini dan tidak mengarahkan plaintif mengembalikan wang RM23 juta kepada defendan (lihat perenggan 35–36, 38 & 44).

(4) Dalam mengambil kira kegagalan balasan keseluruhan, ia adalah tidak

wajar bagi plaintif untuk bergantung pada penyerahan hak/perjanjian tambahan untuk menuntut jumlah RM2.5 juta daripada defendan. Sekiranya tindakan asal dibenarkan, plaintif akan diperkayakan secara tidak adil dengan jumlah itu kerana mereka tidak boleh menyerahkan sebarang hak atau kepentingan secara mutlak atas tanah kepada defendan. Atas sebab itu, tindakan asal harus ditolak dan bukan atas alasan yang diberikan oleh Mahkamah Tinggi, iaitu defendan tidak melanggar perjanjian penyerahan hak/tambahan. Dalam erti kata lain, walaupun ia diandaikan bahawa defendan telah melanggar perjanjian penyerahan hak/tambahan, tindakan asal masih harus ditolak kerana ia adalah tidak wajar bagi plaintif menuntut RM2.5 juta daripada defendan (lihat perenggan 40–41).

(5) Mahkamah Tinggi terkhilaf dalam mendapati bahawa plaintif telah mengalami kerugian. Mereka tidak mungkin mengalami apa-apa kerugian kerana mereka tidak pernah berada dalam kedudukan untuk menyerahkan sepenuhnya apa-apa hak atau kepentingan dalam tanah kepada defendan di bawah perjanjian penyerahhakan/tambahan (lihat perenggan 42).

(6) Defendan tidak boleh bergantung pada s 71 AK kerana seksyen itu hanya terpakai apabila tiada kontrak antara pihak-pihak, tidak seperti dalam kes semasa (lihat perenggan 51).]

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Goh Yew Chew & Anor v Soh Kian Tee [1970] 1 MLJ 138, FC (refd)

Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)

Martin v Andrews (1856) 119 ER 1148, KBD (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335, HC (folld)

Spring Max Capital Sdn Bhd v Johari bin Hasan (trading under the name and style of Gemilang MK Enterprise) & Ors and another suit [2020] MLJU 399; [2021] 2 MLRH 449, HC (refd)

Legislation referred to

Civil Law Act 1956 s 3

Contracts Act 1950 ss 66, 71, 74(1)

Evidence Act 1950 s 103
Moneylenders Act 1951
Rules of Court 2012 O 34 r 2(2)(j)

Appeal from: *Lim Swee Choo dan satu lagi lwn Ong Koh Hou @ Won Kok Fong* [2022] MLJU 1065 (High Court, Kuala Lumpur)

Lee Hong Yap (HY Lee & Co) in Civil Appeal No W-02(NCvC)(W)-439–03 of 2022 for the appellants.
Alfred Lai Choong Wui (with Jonathan Gerard, Toh Mei Swan and Chua Yee Soong) (Alfred Lai & Partners) in Civil Appeal No W-02(NCvC)(W)-449–03 of 2022 for the appellants.
Alfred Lai Choong Wui (with Jonathan Gerard, Toh Mei Swan and Chua Yee Soong) (Alfred Lai & Partners) in Civil Appeal No W-02(NCvC)(W)-439–03 of 2022 for the respondent.
Lee Hong Yap (HY Lee & Co) in Civil Appeal No W-02(NCvC)(W)-449–03 of 2022 for the respondent.

Wong Kian Kheong JCA (delivering judgment of the court):

A. INTRODUCTION

[1] We shall refer to parties as they were in the High Court.

[2] This judgment concerns the following two appeals ('two appeals') which emanated from one suit in the High Court ('this suit'):

(a) Appeal No W-02(NCvC)(W)-439–03 of 2022 ('first appeal') had been filed by the first and second plaintiffs ('first plaintiff' and 'second plaintiff' who will be collectively referred to in this judgment as the 'plaintiffs') against the High Court's dismissal of this suit ('original action') filed by the plaintiffs against the defendant (defendant); and

(b) the defendant had filed Appeal No W-02(NCvC)(W)-449–03 of 2022 ('second appeal') against the High Court's dismissal of the defendant's counterclaim against the plaintiffs ('counterclaim').

[3] The two appeals were heard together in the Court of Appeal and discussed, among others, the effect of the doctrine of total failure of consideration as follows:

(1) whether the doctrine of total failure of consideration provides for restitutionary or compensatory relief; and

(2) is the application of the doctrine of total failure of consideration distinct from:

A (a) a cause of action for breach of contract under s 74(1) of the Contracts Act 1950 ('the CA'); and

(b) s 71 of the CA?

B. BACKGROUND

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[4] Since 2013, the first plaintiff owed RM20m to the defendant ('first plaintiff's debt (defendant)').

C **[5]** On 23 June 2015, the plaintiffs entered into a sale and purchase agreement ('SPA (DAL-plaintiffs)') with DA Land Sdn Bhd ('DAL') wherein DAL sold to the plaintiffs four pieces of land in Rawang ('four lots (Rawang land)') at a price of RM23m ('price (SPA (DAL-plaintiffs))').

D **[6]** The plaintiffs entered into an agreement with the defendant on 20 October 2015 (assignment (plaintiffs-defendant)). According to the assignment (plaintiffs-defendant), among others:

(1) cl 1 stated that the plaintiffs assigned absolutely their rights in the four E lots (Rawang land) to the defendant for a price of RM25.5m ('price (assignment (plaintiffs-defendant))'); and

(2) sub-para 10(a) of the recital provided that RM20m from the price ('assignment (plaintiffs-defendant)') was set off from the first plaintiff's debt (defendant). F

[7] The defendant paid a sum of RM3m to the plaintiffs pursuant to the assignment (plaintiffs-defendant). Consequently, the defendant had paid a total sum of RM23m for the assignment (plaintiffs-defendant).

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[8] With regard to the assignment (plaintiffs-defendant), an undated supplemental agreement was concluded between the plaintiffs and defendant ('supplemental agreement (assignment (plaintiffs-defendant))'). The supplemental agreement (assignment (plaintiffs-defendant)) provided as H follows, among others:

(1) cl 2.2 stated that a sum of RM2.5m 'shall be treated' as the plaintiffs' 'investment' in the four lots (Rawang land); and

I (2) according to cl 3, the sum of RM2.5m 'shall represent 4.5% of the value' of the four lots (Rawang land).

The effect of supplemental agreement (assignment (plaintiffs-defendant)) was that the plaintiffs had only assigned absolutely to the defendant 95.5% of their interest in the four lots (Rawang land) for RM23m.

[9] On 17 December 2015, seven plaintiffs ('plaintiffs ('Suit 688')') filed Suit No 22NCvC-688–12 of 2015 in the Kuala Lumpur High Court ('Suit 688') against four defendants ('defendants (Suit 688)'). In Suit 688, among others:

(1) one of the plaintiffs (Suit 688) was DAL while two of the defendants (Suit 688) were the plaintiffs;

(2) the plaintiffs (Suit 688) alleged that, among others:

(a) the first plaintiff had lent a sum of RM20m to the plaintiffs (Suit 688) with interest at the rate of 5% per month ('unlicensed moneylending transaction (first plaintiff-DAL)'); and

(b) the repayment of the unlicensed moneylending transaction (first plaintiff-DAL) was secured by way of, among others, the four lots (Rawang land). Consequently, the SPA (plaintiffs-DAL) was a sham agreement which had contravened the Moneylenders Act 1951 ('the MA').

(3) the plaintiffs (Suit 688) had prayed for, among others, a declaration that the SPA (plaintiffs-DAL) was void; and

(4) the defendants (Suit 688) counterclaimed against the plaintiffs (Suit 688).

[10] DAL entered into a sale and purchase agreement with the defendant on 24 May 2016 ('SPA (DAL-defendant)'). According to the SPA (DAL-defendant), among others, DAL sold three of the four lots (Rawang land) ('three lots (Rawang land)') to the defendant for a price of RM84m.

[11] On 2 June 2016, all the parties in Suit 688 entered into a consent judgment in the Kuala Lumpur High Court ('consent judgment (Suit 688)'). According to the consent judgment (Suit 688), among others:

(1) Suit 688 against the defendants (Suit 688) was withdrawn with no order as to costs;

(2) the counterclaim of the defendants (Suit 688) against the plaintiffs (Suit 688) was withdrawn with no order as to costs; and

(3) para 3(ii)(a) stated that based on a settlement agreement dated 9 May 2016 which was agreed to by all the parties in Suit 688 ('settlement agreement (parties in Suit 688)'), among others, the defendants (Suit 688) admitted that the defendants (Suit 688) had no right, claim or caveatable interest in the four lots (Rawang land) (para 3(ii)(a) consent judgment (Suit 688)).

[12] The following two suits had been filed in the Shah Alam High Court regarding the three lots (Rawang land):

(1) Suit No BA-22NCvC-396–07 of 2017 ('Suit 396') had been filed by DAL against the defendant. In Suit 396, among others, DAL pleaded that the SPA (DAL-defendant) was void on the ground that the defendant and DAL had entered into an unlicensed moneylending transaction ('unlicensed moneylending transaction (defendant-DAL)'); and

(2) the defendant had instituted Suit No BA-22NCvC-88–02 of 2017 against DAL ('Suit 88').

[13] Suits 396 and 88 were tried together and Mohd Shariff bin Abu Samah JC had decided, among others, that the SPA (DAL-defendant) was void due to the unlicensed moneylending transaction (defendant-DAL) which contravened MA ('High Court's decision (SPA (DAL-defendant))'). With regard to the High Court's decision (SPA (DAL-defendant)):

(1) the defendant's appeal to the Court of Appeal against the High Court's decision (SPA (DAL-defendant)) was dismissed with costs (Court of Appeal's decision (SPA (DAL-defendant))); and

(2) the Federal Court dismissed with costs the defendant's application for leave of the Federal Court to appeal against the Court of Appeal's decision (SPA (DAL-defendant)).

C. THIS SUIT

[14] In the original action, the statement of claim ('SOC') pleaded as follows, among others:

(1) paras 5 to 8 stated matters regarding the SPA (DAL-plaintiffs);

(2) para 9 admitted the first plaintiff's debt (defendant);

(3) according to para 13, the assignment (plaintiffs-defendant) was concluded wherein, among others, part of the price (assignment (plaintiffs-defendant)), ie, RM20m, was set off from the first plaintiff's debt (defendant);

(4) para 14 pleaded that the plaintiffs and defendant had executed the supplemental agreement (assignment (plaintiffs-defendant));

(5) the plaintiffs admitted in para 16 that the defendant had paid RM3m to the plaintiffs pursuant to the assignment ('plaintiffs-defendant');

(6) according to paras 19 to 21:

(a) the defendant had breached the assignment (plaintiffs-defendant)

and supplemental agreement (assignment (plaintiffs-defendant)) ('alleged defendant's breach (assignment (plaintiffs-defendant))'); and

(b) the alleged defendant's breach (assignment (plaintiffs-defendant)) had caused loss in the form of 'special damages' to the plaintiffs in a sum of RM2.5m.

(7) paras 23 and 23.1 pleaded that:

(a) by way of a letter dated 28 November 2016, the first plaintiff had, among others, demanded for the defendant to pay RM2.5m due to the alleged defendant's breach (assignment (plaintiffs-defendant)) ('first plaintiff's demand (28 November 2016)'); and

(b) the defendant did not deny the first plaintiffs demand (28 November 2016).

(8) in para 26, the plaintiff's prayed for the following relief, among others:

(a) the defendant shall pay RM2.5m to the plaintiffs as special damages for the alleged defendant's breach (assignment (plaintiffs-defendant)); and

(b) the defendants shall be liable to the plaintiffs for general damages as a result of the alleged defendant's breach (assignment (plaintiffs-defendant)).

[15] The defendant denied the original action and the counterclaim pleaded as follows, among others:

(1) according to sub-paras 4(b) to (g):

(a) the plaintiffs had deceived the defendant to enter into the assignment (plaintiffs-defendant);

(b) the first plaintiff's debt (defendant) was utilised to set off part of the price (assignment (plaintiffs-defendant)), ie, RM20m;

(c) the defendant had paid RM3m to the plaintiffs pursuant to the assignment (plaintiffs-defendant);

(d) before the conclusion of the assignment (plaintiffs-defendant), DAL sold one of the four lots (Rawang land) ('one lot (Rawang land)') to Mr Ho Fock Cheoy ('sale (DAL-Ho)');

(e) the defendant confronted the plaintiffs regarding the sale (DAL-Ho) and the plaintiffs admitted that the plaintiffs had concealed the sale (DAL-Ho) from the defendant; and

(f) with the agreement of the plaintiffs:

A (i) the defendant entered into the SPA (DAL-defendant) in respect of the three lots (Rawang land); and

(ii) the plaintiffs' investment of 4.5% of the value of the four lots (Rawang land) was varied to be a 4.5% investment of the plaintiffs in the value of the three lots (Rawang land).

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(2) para 7 alleged that the SPA (DAL-plaintiffs) was actually an unlawful moneylending transaction wherein the plaintiffs had lent a sum of RM20m to DAL with interest amounting to RM3m;

C (3) according to para 8, the plaintiffs intended for:

(a) the defendant to bear the interest of RM3m which was imposed by the plaintiffs on DAL; and

(b) the defendant to pay RM2.5m as further profit for the plaintiffs.

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Paragraph 9 averred that the SPA (DAL-plaintiffs) was void due to a contravention of the MA;

(4) paras 11 and 18 pleaded that the plaintiffs had no right to assign to the defendant under the assignment (plaintiffs-defendant);

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(5) para 19 alleged that the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) were void;

(6) para 20 averred that there was a total failure of consideration in respect of the four lots (Rawang land) or three lots (Rawang land); and

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(7) the defendant prayed for, among others, the following remedies:

(a) sub-para 21(a) prayed for the plaintiffs to be jointly and severally liable to return the sum of RM23m to the defendant; and

G (b) an order for the plaintiffs to pay to the defendant 5%pa on the amount of RM23m from the' date of judgment of the court until full settlement of the same — please refer to sub-para 21(b).

H **[16]** The plaintiffs and defendant had agreed to, among others, the following facts under O 34 r 2(2)(j) of the Rules of Court 2012:

(1) sub-para 5(a) — the first plaintiff's debt (defendant) was used to set off part of the price (assignment (plaintiffs-defendant)); and

I (2) para 8 — the defendant had paid RM3m to the plaintiffs pursuant to the assignment (plaintiffs-defendant).

D. THE HIGH COURT'S DECISION AND REASONS

[17] After a trial ('trial'), on 18 February 2022, the learned High Court judge dismissed both the original action and counterclaim without any order as to costs ('High Court's decision').

[18] According to the High Court's 'grounds of judgment' ('GOJ'), among others:

(1) there was no evidence to prove that the assignment (plaintiffs-defendant) was tainted with the illegal SPA (DAL-plaintiffs) ('High Court's finding (mixed fact and law)'): please refer to sub-paras 34.1, 34.1.1 to 34.1.5 and 34.2 GOJ;

(2) sub-paras 34.3 and 34.3.1 GOJ stated that the plaintiffs had knowledge of the sale (DAL-Ho), ie, the plaintiffs knew that DAL had sold one lot (Rawang land) to Mr Ho ('High Court's first factual finding');

(3) in view of the sale (DAL-Ho):

(a) the assignment (plaintiffs-defendant) could not be completed without any variation;

(b) the plaintiffs had consented to the SPA (DAL-defendant) regarding the three lots (Rawang land); and

(c) the defendant had not breached the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) ('High Court's second factual finding'),

please see sub-paras 34.4 to 34.6 GOJ.

(4) sub-para 34.7 stated as follows:

> *Analisa awal saya mendapati bahawa plaintif memang kerugian tetapi persoalan yang lebih penting adalah samada kerugian tersebut disebabkan oleh defendan atau [DAL]?* (Emphasis added.)

We shall refer to the above finding of the learned High Court judge regarding the loss allegedly suffered by the plaintiffs in this case as the 'High Court's third factual finding';

(5) the plaintiffs were not entitled to claim for RM2.5m from the defendant — please refer to sub-paras 34.8 to 34.9 GOJ. Paragraphs 35 and 36 GOJ explained why the plaintiffs were not entitled to claim damages from the defendant; and

(6) in sub-paras 34.10 to 34.13 GOJ, the learned High Court judge gave the following reasons for rejecting the counterclaim:

(a) after the conclusion of the SPA (DAL-defendant), the defendant

A did not claim for the return of RM23m from the plaintiffs on the ground that the assignment (plaintiffs-defendant) was tainted with the illegal SPA (DAL-plaintiffs); and

(b) the defendant's loss was not caused by the plaintiffs but was actually due to the defendant's own greed in trying to take advantage of DAL (High Court's fourth factual finding).

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E. CONTENTIONS OF PARTIES

C **[19]** With regard to the two appeals, the plaintiffs' learned counsel submitted as follows, among others:

(1) the plaintiffs did not agree to the SPA (DAL-defendant) regarding the three lots (Rawang land);

D (2) the alleged defendant's breach (assignment (plaintiffs-defendant)) had been proven by the plaintiffs, especially when the defendant did not deny the first plaintiff's demand (28 November 2016);

(3) as a result of the alleged defendant's breach (assignment (plaintiffs-defendant)), the plaintiffs had suffered a loss of RM2.5m E which should be compensated by the defendant;

(4) there was no total failure of consideration in respect of the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) because both these agreements had expressly provided for valuable consideration; and

F

(5) the defendant was estopped from claiming for the return of RM23m from the plaintiffs.

G **[20]** The defendant's learned counsel advanced the following contentions, among others, to resist the first appeal and to substantiate the second appeal:

(1) the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) were tainted with the illegal SPA (DAL-plaintiffs). Consequently, both the assignment (plaintiffs-defendant) and supplemental agreement (assignment H (plaintiffs-defendant)) were void according to MA;

(2) as the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) were void, the defendant was entitled to the return of RM23m from the plaintiffs under s 66 of the I CA; and

(3) in addition to the application of s 66 of the CA, the plaintiffs are bound to return RM23m to the plaintiffs pursuant to:

(a) s 71 of the CA; and/or

(b) the doctrine of total failure of consideration.

F. ISSUES

[21] These two appeals raise the following questions:

(1) were the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) tainted with the illegal SPA (DAL-plaintiffs)? The answer to this issue will decide the application of s 66 of the CA in this case;

(2) whether there was a total failure of consideration of the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) due to:

(a) para 3(ii)(a) consent judgment (Suit 688);

(b) the settlement agreement (parties in Suit 688); and

(c) the sale (DAL-Ho) regarding one lot (Rawang land).

(3) if there was a total failure of consideration of the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)):

(a) whether the plaintiffs can claim for the payment of RM2.5m from the defendant. This question depends on whether it is unconscionable for the plaintiffs to do so; and

(b) can the defendant claim for the return of RM23m from the plaintiffs? In this regard:

(i) whether the learned High Court judge could refuse to order the plaintiffs' return of RM23m to the defendant on the ground that the defendant's loss was not caused by the plaintiffs but was caused by the defendant's own greed; and

(ii) was the defendant estopped from claiming for the return of RM23m from the plaintiffs? This issue also discusses what is the effect, if any, of the defendant's failure to deny the first plaintiff's demand (28 November 2016)?

(4) can the defendant rely on s 71 of the CA to support the counterclaim?

A OUR DECISION

G. WHETHER ASSIGNMENT (PLAINTIFFS-DEFENDANT) AND SUPPLEMENTAL AGREEMENT (ASSIGNMENT (PLAINTIFFS-DEFENDANT)) WERE TAINTED WITH ILLEGAL SPA (DAL-PLAINTIFFS)

[22] Firstly, whether an agreement or document ('agreement of document') has contravened any law is a question of mixed fact and law, namely:

(1) what is the true nature and substance of the agreement of document (factual issue); and

(2) whether the agreement of document has breached any law (legal question).

[23] Secondly, any party who is dissatisfied with any agreement of document, can easily allege that the agreement of document is illegal. Worse still, a party who has breached a contract, may attempt to evade his or her contractual obligations by relying on a spurious ground that the contract is unlawful. Accordingly, courts should be slow to strike down commercial transactions based on illegality, especially when valuable consideration has been provided for those transactions. We cite the following judgment of Edgar Joseph Jr FCJ in the Federal Court case of *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 at p 104; [1999] 2 CLJ 997 at p 1015–1016:

> Is The Trend In Common Law Countries To Be Slow In Striking Down Commercial Contracts Applicable Here?
>
> It is true that s 3 of the Civil Law Act 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect; that is 7 April 1956, only in so far as the circumstances permit and save where no provision has been made by Statute law. We therefore heartily agree with the court in *Chung Khiaw Bank*that the development of the Common Law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. *But, having said that, we consider that the trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law*. (Emphasis added.)

[24] Thirdly, we are of the considered view that the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) had not been tainted with the illegal SPA (DAL-plaintiffs). Our reasons are as follows:

(1) no evidence had been adduced at the trial to prove on a balance of probabilites that the SPA (DAL-plaintiffs) had contravened the MA and was thus void; and

(2) even if it is assumed that the SPA (DAL-plaintiffs) had breached the MA and was therefore void ('illegal SPA (DAL-plaintiffs)'), there was no evidence which had been produced by the defendant to show that the illegal SPA (DAL-plaintiffs) had subsequently tainted the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)).

[25] Fourthly, by reason of s 103 of the Evidence Act 1950 ('the EA'), a party who avers the illegality of an agreement of document bears the evidential burden to prove the illegality. We reproduce below s 103 of the EA:

> *Burden of proof as to particular fact*
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*. (Emphasis added.)

We agree with the learned High Court judge that the defendant had failed to discharge the evidential onus pursuant to s 103 of the EA to prove on a balance of probabilities that the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) had been tainted by the illegal SPA (DAL-plaintiffs);

[26] Lastly, we are not satisfied that the defendant has shown that the High Court's finding (mixed fact and law) is 'plainly wrong' which can justify the setting aside of the High Court's finding (mixed fact and law) by the Court of Appeal.

[27] Section 66 of the CA provides as follows:

> *66 Obligation of person who has received advantage under void agreement, or contract that becomes void.*
>
> *When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it*. (Emphasis added.)

[28] It is clear that s 66 of the CA only applies in this case if the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)):

(1) were 'discovered to be void'; or

(2) had become void.

As explained in the above paras 24 to 26, the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) had not been tainted with the illegal SPA (DAL-plaintiffs). Consequently:

(a) the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) had not been discovered to be void or had become void as understood in s 66 of the CA; and

(b) there is no room for the defendant to invoke s 66 of the CA in this case.

H. DOCTRINE OF TOTAL FAILURE OF CONSIDERATION

H(1) Origin and effect of doctrine

[29] Our research reveals that as early as 1856, in *Martin v Andrews* (1856) 119 ER 1148, the English Court of Queen's Bench had allowed a claim for the return of money paid to a subpoenaed witness when the action in that case had been settled before trial. The following three judgments have been delivered in *Martin*, at p 1149:

Lord Campbell CJ:

The declaration is for money had and received; and the only plea is Nunquam indebitatus. It appears that the defendant received 61. as conduct money: and, on the evidence, he did nothing in pursuance of the subpoena: he only attended, as attorney for one of the parties, to settle the cause. We have therefore to consider the general question whether money so paid to a party on a subpoena is, or is not, recoverable as money had and received. I think it is. The consideration has failed. The money is paid for the purpose of defraying the expences of the witness's journey: if there is no journey there is no expence, and the consideration fails; and then an action lies for money had and received. There is indeed no express authority; but the general principles upon which that action is maintained are applicable. Had this been a summary application for the exercise of our jurisdiction, I incline to think that we could not have ordered the defendant to refund the money, the plaintiff having included the sum in the judgment. But we must here look at the record. The only plea is Nunquam indebitatus; and it is clear that, before the taxation, the defendant was indebted to the plaintiff. Even if what took place before the Master raised a defence, Mr Prentice was unable to suggest to us, ore tenus, a plea under which such defence could be shewn.

Coleridge J:

I am entirely of the same opinion; and I have nothing to add.

...

Erle J:

I have only to add that here the money was not paid under a contract that the defendant should attend: the plaintiff was obliged by the law to give the conduct money. If he had not given it, and the defendant had incurred expence, the plaintiff would have been liable to the defendant; and, if the defendant, not being paid, had not attended, and the

plaintiff had sued him for such non-attendance, there must have been a nonsuit. (Emphasis added.)

[30] It is clear from *Martin* that the doctrine of total failure of consideration is not confined to money paid under contracts. Having said that, this doctrine has now been applied by courts in the Commonwealth, including Malaysia, to allow restitution of money, benefit and/or advantage (money of benefit of advantage) provided under contracts on the ground that the 'consideration' for the provision of the money of benefit of advantage has totally failed. We cite the following judgment of Ali FCJ in the Federal Court case of *Goh Yew Chew & Anor v Soh Kian Tee* [1970] 1 MLJ 138, at p 141:

> So far as the respondent's claim as pleaded was founded on a frustration of contract, the finding on issue No (2), in view of the principle of frustration just referred to, is clearly against him. If the matter is to rest here, the claim as pleaded must fail. *But treated as a finding that there has been a total failure of consideration the conclusion of the learned trial judge that the respondent is entitled to the return of the money paid can be supported on the principle that the respondent's right to recover the money arises, not ex contractu, but by operation of law since the common law gives a remedy in quasi-contract to a party who has not got what he bargained for. This principle or doctrine of failure of consideration was stated by Viscount Simon LC in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 in these words*:
>
> > *The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use* ... (Emphasis added.)

Premised on *Goh Yew Chew*, if a party (X) has provided money of benefit of advantage to another party (Y) under the contract between X and Y (contract) and if there is a total failure of consideration of the contract:

(1) X may apply to court for an order to compel Y to restore the money of benefit of advantage to X; and

(2) X cannot claim damages from Y for Y's breach of the contract.

As explained above, the doctrine of total failure of consideration only provides restitutionary (not compensatory) relief for X against Y. It is to be noted that the doctrine of total failure of consideration is not provided in the CA. This is understandable as the CA is not a code of written law which provides a comprehensive set of provisions regarding agreements.

[31] According to two judgments in the Federal Court court case of *Berjaya*

Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, the doctrine of total failure of consideration provides a valid ground for X to rescind the contract. We reproduce below the relevant parts of the two judgments in Berjaya Times Square:

(1) according to Zulkefli Ahmad Makinudin FCJ (as he then was), at [4]:

> [4] *As regards the law on rescission of contract which is the main issue to be decided in the present case, l am of the view on the factual matrix of the case that s 56(1) should be read together with s 40 of the CA in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract A reference to ss 40 and 56(1) of the CA clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration*. What is of significance on the facts of this case is that there is no question of the appellant not having done anything on the construction of the property as undertaken by them vide the SPA. Indeed, the facts before the court showed that the construction of the property was completed and was in the state of delivery to the respondent. It is my view that the entitlement of the respondent in this case is confined and limited to compensation in the form of LAD as agreed upon in the SPA and that the respondent has no right to rescind the SPA. (Emphasis added.)

(2) Gopal Sri Ram FCJ has decided as follows, at [17], [18] and [20]:

> [17] *That said, it is now settled that there is, at common law, a right to rescind a contract in very limited circumstances. In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. In Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, *at p 48, Viscount Simon LC said*:
>
> > *... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.*
> >
> > *If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled ...*
>
> [18] *What has to be added to the learned Lord Chancellor view is the qualification*:
>
> > *... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract ... but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due* (*Stocznia Gdanska SA v Latvian Shipping Co & Ors* [1988] 1 All ER 883 *per Lord Goff of Chieveley*).

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety. The facts of Stocznia Gdanska SA v Latvian Shipping Co & Ors [1988] 1 All ER 883 *illustrate the proposition*.

...

[20] *Absent a total failure of consideration, the common law right to rescind does not exist. Goff & Jones The Law of Restitution (6th Ed) which is the leading text on the subject has this to say* at p 502, para 20-007:

> A breach of contract may be so fundamental that it deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26). The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for recovery of the money provided that the consideration for the payment has wholly failed; if the consideration has partially failed, his only action is for damages. (Emphasis added.)

In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages. What is important is that this limited common law right to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See ss 34–37 of the Specific Relief Act 1950. (Emphasis added.)

[32] It is to be noted that in the *Law of Contract* (4th Ed) (2011), at [12.51], Professor Visu Sinnadurai (as he then was) has commented that *Berjaya Times Square* did not distinguish between a claim for restitution and a claim for breach of an agreement.

[33] In the Federal Court case of *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464, at [55], [56] and [58] to [60], Richard Malanjum CJ (Sabah and Sarawak) has expressed the following obiter dicta regarding *Berjaya Times Square*:

[55] *There are some other issues raised in the course of argument before us. However, we do not think we need to seriously address them since they do not form part and parcel of the questions posed for our consideration. Nevertheless, for completeness we will briefly discuss them*.

A [56] Learned counsel for the plaintiff submitted that the main principle of law enunciated in *Berjaya Times Square Sdn Bhd* should be applied in this case. Learned counsel for the defendants opined otherwise.

B [58] *In Berjaya Times Square Sdn Bhd it was held as long as some work has been done indicating that the development or construction had commenced, there would be no total failure of consideration because the promise had been performed although not in its entirety. On the facts of that case the decision may be supportable, But we do not agree with the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled*.

C [59] *In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as Berjaya Times Square Sdn Bhd. This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of an office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety*.

D

E [60] *In fact in Berjaya Times Square Sdn Bhd, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works (see Tan Yang Loong & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289; Chye Fook v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308; Law Ngei Ung v Tamansuri Sdn Bhd [1989] 2 CLJ 44 (Rep); [1989] 2 CLJ 181). As such the principle should therefore be this, There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance*. (Emphasis added.)

F

G

H(2) Distinction between doctrine of total failure of consideration and breach of contract

[34] We are of the view that the doctrine of total failure of consideration is H different from a cause of action for breach of contract under s 74(1) of the CA as follows:

(1) the doctrine of total failure of consideration enables the court to order restitution of money of benefit of advantage (restitutionary basis): please I refer to *Goh Yew Chew*. The restitutionary basis is in consonance with the general principle of *restitutio in integrum*, namely, to restore the contracting parties to their original legal positions before the conclusion of the agreement in question; and

(2) when an agreement is breached, the court can award damages as

compensation pursuant to s 74(1) of the CA (compensatory basis). Section 74(1) of the CA states as follows:

> s 74(1) *Compensation for loss or damage caused by breach of contract*
>
> *When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.* (Emphasis added.)

It is clear that the restitutionary basis is distinct from the compensatory basis. In the words of Gopal Sri Ram FCJ in *Berjaya Times Square*, at [20], a party relying on the doctrine of total failure of consideration 'can under no circumstances have his money returned and claim damages'.

H(3) Was there a total failure of consideration of assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant))?

[35] Firstly, it is not disputed in this case that the defendant had paid RM23m to the plaintiffs pursuant to the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) (defendant's payments). In consideration for the defendant's payments, the plaintiffs agreed to assign absolutely their rights in the four lots (Rawang land) to the defendant under the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) (consideration).

[36] It is clear that there was a total failure of consideration due to the following reasons:

(1) according to para 3(ii)(a) consent judgment (Suit 688) and the settlement agreement ('parties in Suit 688'), the plaintiffs had no right, claim or caveatable interest in the four lots (Rawang land). The plaintiffs cannot now dispute the contents of para 3(ii)(a) consent judgment (Suit 688) and the settlement agreement (parties in Suit 688). Accordingly, the plaintiffs were not in a position to assign absolutely any right or interest in the four lots (Rawang land) to the defendant under the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)); and

(2) the plaintiffs had actual knowledge of the sale (DAL-Ho) regarding one lot (Rawang land): please refer to the High Court's first factual finding. The plaintiffs have not satisfied us that the High Court's first factual finding is plainly wrong. In view of the sale (DAL-Ho), the plaintiffs could not assign absolutely their rights and interest in the one lot

(Rawang land) to the defendant pursuant to the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)).

[37] As explained in the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at [78], an appellate panel can only set aside a trial court's factual finding if the factual finding constitutes a 'plain' factual error in the following exceptional sense:

(1) the factual finding cannot be reasonably explained or justified; and

(2) no reasonable trial judge could have arrived at the factual finding.

[38] Based on the evidence and reasons stated in the above para 36, the learned High Court judge had made a plain error of fact in failing to decide that there was a total failure of consideration because:

(1) the learned High Court judge's failure to decide that there was a total failure of consideration, cannot be reasonably explained or justified; and

(2) no reasonable trial judge could have failed to decide in this case that there was a total failure of consideration,

('High Court's first plain factual error').

H(4) Was defendant bound to pay RM2.5m to plaintiffs under assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintlffs-defendant))?

[39] When there is a total failure of consideration of an agreement, equity may bar a party from enforcing any right provided in the agreement when the enforcement of such a right is unconscionable. We rely on the following judgment of Gummow J in the High Court of Australia (the apex court in Australia) in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335, at [100]:

> [100] *In all of these areas, as in Moses v Macferlan, notions derived from equity have been worked into and in that sense have become part of the fabric of the common law. Hence the statement in Baltic Shipping by Deane and Dawson JJ where, after indicating that the indebitatus count for money had and received was framed in the traditional language of trust or use, their Honours continued*:
>
> > *[I]n a modern context where common law and equity are fused with equity prevailing, the artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law. In particular, the notions of good conscience, which both the common law and equity recognized as the underlying rationale of the law of unjust enrichment, now dictate that, in applying the relevant*

doctrines of law and equity, regard be had to matters of substance rather than technical form.

Earlier, in Muschinski v Dodds, Deane J, after referring to Moses v Macferlan, and to 'the general equitable notions which find expression in the common law count for money had and received', identified the operation of most of the traditional doctrines of equity as operating upon 'legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct.

One such instance then identified by his Honour concerned the removal of the substratum of a joint relationship or endeavour:

> ... without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it.

Those observations are applicable to the class of case where, in Lord Mansfield's words, money has been paid 'upon a consideration which happens to fail'. This is such a case. (Emphasis added.)

[40] Premised on the above judgment by Gummow J in *Roxborough*, in view of the total failure of consideration in this case, it is unconscionable for the plaintiffs to rely on the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) to claim for a sum of RM2.5m from the defendant. In fact, as found in the High Court's first factual finding, the plaintiffs had actual knowledge of the sale (DAL-Ho). With such actual knowledge, the plaintiffs should not have entered into the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) in the first place. If the original action is allowed, the plaintiffs would be unjustly enriched in a sum of RM2.5m when the plaintiffs cannot assign absolutely any right or interest in the four lots (Rawang land) to the defendant under the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)).

[41] The original action should be dismissed with costs on the ground stated in the above para 40. We should add that we do not share the view of the learned High Court judge on why he had dismissed the original action, ie, the High Court's second factual finding (defendant had not breached the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant))).

As decided by Gummow J in *Roxborough*, the original action is dismissed not because there was no breach of the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant) by the defendant

but because it was unconscionable to allow the plaintiffs to claim RM2.5m from the defendant. In other words, even if it is assumed that the defendant had breached the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)), the court should nonetheless refuse to allow the plaintiffs' unconscionable claim of RM2.5m against the defendant.

[42] According to the High Court's third factual finding, the plaintiffs had suffered loss in this case. This is clearly a plain factual error on the part of the learned High Court judge ('High Court's second plain factual error'). We cannot fathom how the plaintiffs could have suffered any loss in this case when in the first place, the plaintiffs cannot assign absolutely any right or interest in the four lots (Rawang land) to the defendant under the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)):please refer to para 3(ii)(a) consent judgment (Suit 688) and the settlement agreement (parties in Suit 688).

H(5) Outcome of first appeal

[43] In view of the High Court's first and second plain factual errors, we are constrained to:

(1) dismiss the first appeal with costs; and

(2) affirm the High Court's decision regarding the dismissal of the original action.

H(6) Should plaintiffs return RM23m to defendant?

[44] We have no doubt that in view of the total failure of consideration in this case, the High Court should have applied the restitutionary basis and ordered the plaintiffs to return RM23m to the defendant. Such a failure on the part of the learned High Court judge was tantamount to a legal error which:

(a) had caused an injustice to the defendant; and

(b) warrants appellate intervention on our part,

(High Court's first legal error).

[45] According to the High Court's fourth factual finding, the defendant's loss in this case was caused by the defendant's own greed (High Court's second legal error). With respect, we are unable to agree because irrespective of the defendant's greed or altruism, by operation of case law, eg, *Goh Yew Chew*, the learned High Court judge should have applied the restitutionary basis and ordered the plaintiffs to return RM23m to the defendant.

[46] The plaintiffs' learned counsel had submitted that the defendant should be estopped from claiming for the return of RM23m from the plaintiffs. We cannot accede to this contention. Our reasons are as follows:

(1) the doctrine of equitable estoppel is a flexible concept which is applied by courts to achieve justice: please refer to the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 346; [1995] 4 CLJ 283, at p 294. If we have decided that the defendant is estopped from claiming for the return of RM23m from the plaintiffs, this will cause an injustice as follows:

   (a) in view of para 3(ii)(a) consent judgment (Suit 688) and the settlement agreement (parties in Suit 688), the plaintiffs cannot assign absolutely any right or interest in the four lots (Rawang land) to the defendant under the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)). If the defendant is estopped from claiming for the return of RM23m from the plaintiffs, there will be a grave injustice to the defendant because the defendant would have paid RM23m to the plaintiffs in vain!; and

   (b) there will be an unjustifiable windfall to the plaintiffs in a sum of RM23m.

(2) the plaintiffs had actual knowledge of the sale (DAL-Ho) regarding one lot (Rawang land): please refer to the High Court's first factual finding. Notwithstanding the plaintiffs' actual knowledge of the sale (DAL-Ho), the plaintiffs:

   (a) entered into the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)) with the defendant without informing the defendant regarding the sale (DAL-Ho); and

   (b) received a sum of RM3m from the defendant (the first plaintiffs debt (defendant) was used to set off a big part of the price (assignment (plaintiffs-defendant))).

   In view of the above inequitable conduct by the plaintiffs, the plaintiffs cannot now rely on the doctrine of equitable estoppel in this case.

[47] We are not able to see how the defendant's failure to deny the first plaintiffs demand (28 November 2016) can be a valid ground for the High Court's refusal to invoke the restitutionary basis in this case. At the risk of repetition, once there is a total failure of consideration, notwithstanding the defendant's failure to deny the first plaintiffs demand (28 November 2016), the learned High Court judge is bound by case law (eg, *Goh Yew Chew*) to order the

plaintiffs' return of RM23m to the defendant.

H(7) Our decision regarding second appeal

[48] In light of the High Court's first and second legal errors, we have no hesitation to:

(1) allow the second appeal with costs, namely, to allow the counterclaim with costs; and

(2) set aside the High Court's decision which had dismissed the counterclaim.

I. CAN THE DEFENDANT RELY ON S 71 OF THE CA IN THIS CASE?

[49] Section 71 of the CA provides as follows:

> s 71 *Obligation of person enjoying benefit of non-gratuitous act*
>
> *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered*. (Emphasis added.)

[50] It is decided in *Spring Max Capital Sdn Bhd v Johari bin Hasan (trading under the name and style of Gemilang MK Enterprise) & Ors and another suit* [2020] MLJU 399; [2021] 2 MLRH 449, at [54], as follows:

> [54] *I am of the view that s 71 of the CA can only apply if the following five conditions are fulfilled cumulatively*:
>
> (1) *there is no contract which can be enforced (first condition). The first condition is clear because s 71 of the CA is placed in Part VI of the CA (of certain relations resembling those created by contract). In interpreting a statutory provision, the court may consider the division of the statute: please refer to s 16 of the Interpretation Acts 1948 and 1967 ('the IA'). Section 16 of the IA states as follows*:
>
> > 16 *Notice to be taken of division into parts*, chapters, etc.
> >
> > *Where an Act* or subsidiary legislation *is divided into parts* or chapters or otherwise, *the fact and particulars of the division shall*, without express mention thereof in the Act or subsidiary legislation, *be taken notice of in all courts and for all purposes whatsoever*. (Emphasis added.)
>
> *Section 16 of the IA is in Part 1 of the IA and applies to the CA by virtue of s 2(1)(b) of the IA because the CA has been revised under the Revision of Laws Act 1968*.
>
> *If there exists a valid contract between the parties, the contract should be enforced without any resort to s 71 of the CA. If otherwise, a party who has entered into a legally binding contract in accordance with his or her freedom to contract, may subsequently evade unlawfully his or her contractual obligations by relying on s 71 of the CA; and*
>
> (2) *as decided by Lord Upjohn in an appeal to the Privy Council from Malaysia, Siow*

Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, at 120, all the following four conditions must be satisfied before the court may apply s 71 of the CA:

> *It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under s 71.*
>
> *The doing of the act or the delivery of the thing referred to in the section*:
>
> (1) *must be lawful*
>
> (2) *must be done for another person*
>
> (3) *must not be intended to be done gratuitously*
>
> (4) *must be such that the other person enjoys the benefit of the act or the delivery*. (Emphasis added.)

[51] The defendant's learned counsel had invited us to invoke s 71 of the CA in this case. We are unable to accept this submission. As explained in *Spring Max Capital*, s 71 of the CA only applies where there is no contract between the parties. In this case, the plaintiffs and defendant had concluded the assignment (plaintiffs-defendant) and supplemental agreement (assignment (plaintiffs-defendant)).

J. CONCLUSION

[52] Premised on the above evidence and reasons:

(1) the first appeal is dismissed;

(2) the second appeal is allowed, namely, the counterclaim is allowed with the following judgment:

  (a) the plaintiffs are jointly and severally liable to return to the defendant a sum of RM23m ('judgment sum');

  (b) the plaintiffs shall pay to the defendant 5%pa on the judgment sum from 18 February 2022 ('date of the High Court's judgment') until the date of the plaintiff's return of the judgment sum in full; and

  (c) the plaintiffs shall pay to the defendant a sum of RM25,000 as costs for the two appeals and proceedings in the High Court ('subject to allocatur fee').

(3) the High Court's judgment shall be amended as stated in the above sub-paras (2)(a) to (c).

Order accordingly.

Reported by Ashok Kumar